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CARLOS E. KEPKE

15  
16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA  
18 SAN FRANCISCO DIVISION

19 UNITED STATES OF AMERICA,  
20  
21 Plaintiff,  
22  
23 v.  
24 CARLOS E. KEPKE,  
25  
26 Defendant.

Case No. 3:21-CR-00155-JD

**CARLOS KEPKE'S MOTION *IN*  
*LIMINE* TO EXCLUDE EVATT  
TAMINE TESTIMONY, STATEMENTS,  
AND EVIDENCE, OR IN THE  
ALTERNATIVE, TO CONTINUE  
TRIAL**

Date: November 28, 2022  
Time: 9:00 a.m.  
Courtroom: 11, 19th Floor  
Judge: Hon. James Donato

**NOTICE OF MOTION**

Please take notice that on November 28, 2022, at 9:00 a.m., or as soon thereafter as the matter may be heard, Defendant Carlos E. Kepke (“Mr. Kepke”) will and does hereby move to exclude the testimony of, statements of, and/or documents related to Evatt Tamine, or in the alternative, to continue trial to allow for the production and review of materials seized from Mr. Tamine’s home and extensive number of electronic devices.

This motion is supported by the Memorandum of Points and Authorities included herein, all pleadings and papers which are of record and on file in this case, and such other oral and documentary evidence as may be presented at the hearing of this motion.

**MEMORANDUM OF POINTS AND AUTHORITIES**

Despite months of defense requests, the government has not yet produced important and voluminous discovery it obtained from Evatt Tamine’s home and electronic devices. Though the government previously indicated that Mr. Tamine would not play a role in its case, the government recently suggested that it intends to offer alleged co-conspirator statements from Mr. Tamine and has not ruled out calling Mr. Tamine as a witness in its case. Mr. Kepke accordingly moves to preclude the government from offering Mr. Tamine’s testimony, statements, and documents at trial. In the alternative, Mr. Kepke requests a continuance of the trial to allow the government time to produce and Mr. Kepke time to review the evidence.

The government sent the defense a letter on March 10, 2022, explaining that the government had obtained a large amount of materials about Evatt Tamine, which it was working to review. (Decl. of Grant P. Fondo at ¶ 2, Ex. A.) The government said it had produced the first tranche of materials seized from Mr. Tamine’s home in Bermuda, but that it continued to review additional materials from Mr. Tamine’s home for relevance and privilege. (*Id.*) The government added that a box of paper documents and *1.4 Terabytes of data* from Mr. Tamine’s electronic devices were undergoing an offshore review in the United Kingdom. (*Id.*)

Since March, the parties have met and conferred and exchanged correspondence a number of times about the status of this discovery, and the government responded that the offshore review of the documents was ongoing. (Fondo Decl. at ¶ 5.) The discovery deadline of April 25, 2022

1 came and went. (ECF No. 34 at 1.) During a meeting on June 1, 2022, the defense emphasized to  
2 the government that the longer the production was delayed, the more unworkable it would be to  
3 review such a voluminous amount of materials before trial. (Fondo Decl. at ¶ 6.) When the  
4 defense again inquired about these materials on November 3, 2022, the government said that the  
5 offshore review of Mr. Tamine’s approximately eight to 15 devices had just recently concluded  
6 and the government had not yet gained access to the documents. (*Id.* at ¶ 7.) The government  
7 added that it is not sure it will have the documents before trial begins. (*Id.*) The government does  
8 not know exactly how voluminous the documents are. (*Id.*)

9 At the same time the discovery related to Evatt Tamine has been delayed, the government  
10 has engaged in a bait and switch about its intentions as to Mr. Tamine. The government provided  
11 a notice to the defense in August 2022 that Evatt Tamine was one of eight people it considered a  
12 co-conspirator. (Fondo Decl. at ¶ 3, Ex. B.) The notice included no excerpts or summaries of the  
13 testimony it intended to offer relating to these co-conspirators. (*Id.*) The defense raised the issue  
14 of the co-conspirator statements during the status conference on October 20, 2022, noting that it  
15 had received notice only of the purported co-conspirators and not the co-conspirator statements  
16 the government intended to offer. (Tr. at 66:1–66:9, 67:24–68:1.) The Court asked if the  
17 government was going to make that disclosure soon. (Tr. at 68:2–3.) The government responded  
18 that it usually makes a more robust disclosure of the specific co-conspirator statements, but that in  
19 this case the government *did not expect it to be a big issue* and that the government would  
20 provide more clarity for the defense. (Tr. at 68:4–10.)

21 During a meet and confer on November 3, 2022, the subject of the co-conspirator  
22 statements again came up. The government said that Evatt Tamine had been on its witness list but  
23 now the government does not “think” it will call him. (Fondo Decl. at ¶ 7.) The government  
24 added that if it did call Mr. Tamine, it would consider him to be a co-conspirator. (*Id.*) The  
25 government further explained that Mr. Tamine’s emails are included on its exhibit list, but that it  
26 would not use these exhibits if Mr. Tamine did not testify. (*Id.*) On November 5, 2022, the  
27 government provided a letter to the defense giving notice that the government *does* consider Evatt  
28 Tamine to be a co-conspirator of Mr. Kepke, and suggested it would offer statements from Mr.

1 Tamine. (Fondo Decl. at ¶ 4, Ex. C.) In the witness list the government filed on November 7,  
2 2022, Mr. Tamine is not listed, but the government reserves its right to expand or modify its list.  
3 (ECF No. 128.)

4 If Mr. Tamine is going to testify at trial, his statements are going to be offered as  
5 evidence, or the government is going to offer exhibits related to him, Mr. Kepke must have an  
6 opportunity to review the outstanding discovery related to Mr. Tamine. This discovery includes  
7 significant materials from Mr. Tamine's home and several electronic devices. Indeed, given that  
8 Mr. Tamine testified in the competency hearing of Mr. Brockman that he does not believe he  
9 participated in any criminal conduct, it is likely that these materials contain substantial  
10 exculpatory information. *United States v. Brockman*, No. 21-cr-9, ECF No. 252 at 24–25 (S.D.  
11 Tx. Mar. 16, 2022). The government's failure to even review these documents to determine  
12 whether any *Brady* material exists is further cause for concern.

13 Because of the government's discovery delay and shifting positions as to Mr. Tamine, we  
14 are now in a position where we are less than three weeks out from trial, and the defense has not  
15 seen and does not know when or even if it will be able to see potentially exculpatory information  
16 related to an alleged co-conspirator. In fact, even the government has not reviewed this discovery  
17 for exculpatory information. Even if the government were to produce the discovery today, Mr.  
18 Kepke would not be able to review 1.4 Terabytes of documents between now and the trial date.  
19 This creates a substantial risk that Mr. Kepke will not have access to relevant exculpatory  
20 information in time for trial.

21 The government should accordingly be precluded from offering Mr. Tamine as a witness,  
22 presenting Mr. Tamine's statements, and admitting any evidence relating to Mr. Tamine. Fed. R.  
23 Crim. P. 16(d)(2) (authorizing exclusion for failure to produce discovery in accordance with  
24 scheduling orders); *United States v. W.R. Grace*, 526 F.3d 499, 516 (9th Cir. 2008) (upholding  
25 district court's exclusion of evidence related to discovery that was not provided by the deadline  
26 specified in the court's pretrial orders); *United States v. Talbot*, 51 F.3d 183, 187–188 (9th Cir.  
27 1995) (similar).

28 In the alternative, if the Court is not inclined to exclude the relevant evidence, Mr. Kepke

1 requests a continuance of the trial date to allow Mr. Kepke a reasonable amount of time to review  
2 the Tamine materials. Fed. R. Crim. P. 16(d)(2) (authorizing a continuance for failure to produce  
3 discovery in accordance with scheduling orders).

4 Respectfully submitted,

5 Dated: November 10, 2022

6 By: /s/ Grant P. Fondo

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10 **GOODWIN PROCTER LLP**

11 Attorneys for Defendant:

12 CARLOS E. KEPKE

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Northern District of California by using the CM/ECF system on **November 10, 2022**. I further certify that all participants in the case are registered CM/ ECF users and that service will be accomplished by the CM/ECF system.

I certify under penalty of perjury that the foregoing is true and correct. Executed on **November 10, 2022**.

/s/ Grant P. Fondo

GRANT P. FONDO